THE INTERSTATE COMMERCE COMMISSION AND THE JUDICIAL ENFORCEMENT OF THE ACT TO REGULATE COMMERCE.

In these latter days, a court should have little difficulty in determining its proper course when plainly called upon to choose, as courts are often compelled to choose, between the letter and the spirit of a statute. For the primary object of construction is, after all, to carry out the legislative will; and this is not to be accomplished without subordinating the language of a statute to its policy and purpose, when the two are squarely in conflict.

This familiar canon of interpretation is now accepted, at least in theory, by most if not all courts, most notably, perhaps, by the Supreme Court of the United States.[1] Only the particular applications of the rule are disputed. Except in our highest tribunal, departures in practice are by no means rare; and in matters of great public interest a fearless adherence to the principle occasionally excites adverse criticism, both lay and professional. The decisions in the Standard Oil[2] and Tobacco[3] cases are familiar examples of this. Such criticism may even go the length of attacking the doctrine and demanding its abandonment.[4] Yet unless the courts are to abdicate one of their weightiest functions—that of giving rational and effective voice to the obscure or conflicting utterances of the legislature—the "rule of reason" cannot be laid aside. Like any other efficient instrument of government, it may be abused or perverted. This affords small excuse for stripping the courts of its intelligent use whenever such use is essential to supplement the written law.

Certain recent decisions of the Federal Supreme Court round out a process of judicial development under the Act to Regulate Commerce which strikingly illustrates this sort of creative interpretation. The Commerce Act has sorely needed the fostering aid of such interpretation to effectuate its underlying purposes. It has grown by a process of gradual accretion. Particularly in extending the powers of the Interstate Commerce Commission has Con-

[1]Holy Trinity Church *v.* United States (1892) 143 U. S. 457; Pickett *v.* United States (1910) 216 U. S. 456, 461.

[2]Standard Oil Co. *v.* United States (1911) 221 U. S. 1.

[3]United States *v.* American Tobacco Co. (1911) 221 U. S. 106.

[4]Roe, Our Judicial Oligarchy, 57-59, 73-105.

gress advanced step by step.[5] The result is that in this regard the Act is at present something of a patchwork, with certain inconsistencies on its face which have called for intelligent and at times dynamic construction to weld it into a coherent whole. Yet were their field less technical or better understood than it is to-day by the public at large, at least one of these decisions could hardly have escaped the hostile eye of the undiscriminating critic. As it is they have passed into the body of law comparatively unnoticed, and may here be placidly discussed on their merits.

The phase of this judicial evolution which the present article seeks to trace concerns those remedial provisions of the Act which declare the respective functions of the Commission and the courts. To define somewhat more exactly the scope of this article: it deals but incidentally with the power of the courts to review the Commission's findings, or with the machinery provided for enforcing its orders. Our question is one of *priority* of jurisdiction: the circumstances under which an order or finding by the Commission is a condition precedent to *any* judicial action.

Private Remedies.

The rules which govern in civil suits under the Act have now been worked out to a point which closely approaches completeness.

The doctrines of the three leading cases of this branch of the problem are familiar law. By way of premise to our subsequent discussion, however, they may well be set down here.

The first of these was *Texas and Pacific Railway Co.* v. *Abilene Cotton Oil Co.*[6] There a shipper sued a carrier in a state court to recover damages for alleged unreasonable rates charged on interstate shipments of cotton seed oil. The rate complained of was part of a schedule duly filed with the Interstate Commerce Commission. That body had never passed on its legality. The trial court, however, found as a fact that the rate was unreasonable. The Supreme Court held that the action did not lie; that the shipper must first invoke redress through the Interstate Commerce Commission before seeking relief in the courts.

The suit was based upon the common law right to recover damages for unreasonable charges by a common carrier, and might have been disposed of on the ground that the Act abrogated that

[5] See especially §§ 15 and 16 of the original Act (24 Stat. 384, 385) and *cf.* amendments of March 2, 1889 (25 Stat. 859), June 29, 1906 (34 Stat. 589, 590), and June 18, 1910 (36 Stat. 551, 554).

[6] (1906) 204 U. S. 426.

right. But the court went farther than this. Section 9 of the Act[7] was relied on to show that Congress intended the courts to exercise independent jurisdiction in awarding damages to shippers. The court, without alluding to the fact that the section had no application to state tribunals,[8] flatly refused to construe it as conferring any right to recover damages for unreasonable charges prior to a finding by the Commission. Since the Act required that established rates be adhered to until altered by action of the Commission or the filing of new rates, the result of recognizing such a right, it was said, would be

"that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be in force."

The counter suggestion, that the judgment of the court in such a suit would *ipso facto* change the scheduled rate, was declared to be untenable:

"For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions

[7]Providing, "that any person * * * claiming to be damaged by any common carrier * * * may either make complaint to the Commission * * * or may bring suit in his * * * own behalf for the recovery of the damages * * * in any district or circuit court of the United States of competent jurisdiction; but such person * * * shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he * * * will adopt." (24 Stat. 382.)

[8]Since this decision, § 16 has been amended by Act of June 18, 1910 (36 Stat. 551), so as to allow suit on an award of reparation by the Commission to be brought in a state court of general jurisdiction as well as a federal district court. Darnell *v.* Illinois Central R. R. Co. (1912) 225 U. S. 243. This apparently has no effect, however, on the original suit for damages contemplated by § 9.

against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

The effect of § 9 was thus defined:

"The independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission."[9]

This case has been quoted from at length because it is the foundation of substantially all the later law on the subject.

It was followed in 1910 by *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*[10] In that case mandamus was brought by a shipper against the railroad, under § 23 of the Act, to prevent an alleged discrimination in the distribution of coal cars pursuant to a regulation of the carrier. Although by the terms of § 23[11] this remedy is cumulative, the court held that it could not be availed of prior to a finding by the Commission that the practice was unjustly discriminatory.

This result was based largely upon the considerations which governed the decision in the *Abilene* case, and in addition upon the amendment to § 15 of the Act adopted in 1906,[12] whereby the Commission was empowered, not only to determine the legality of the practice complained of, but to direct the practice to be followed in the future. It was declared that

"to give to § 23 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, * * * ."

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[9](1906) 204 U. S. 440, 442.

[10](1910) 215 U. S. 481.

[11]Section 10 of Act of March 2, 1889 (25 Stat. 862), concluding: "Provided, That the remedy hereby given * * * by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement."

[12]34 Stat. 589. In U. S. *ex rel.* Stony Fork Coal Co. *v.* L. & N. R. R. Co. (1912) 195 Fed. 88, the Commerce Court (two judges dissenting) held the doctrine of the Pitcairn case inapplicable to a petition by a shipper alleging that the defendant carriers refused to move his coal at all under a through route and joint rate established by them, and issued a writ of mandamus under § 23 without prior action by the Commission. This conclusion finds support in L. & N. R. R. Co. *v.* Cook Brewing Co. (1912) 223 U. S. 70, 83-84, where it was held unnecessary under the Abilene rule for a shipper, who had been refused transportation of liquor into dry territory because of the alleged prohibition of a state statute, to go to the Commission before suing for a mandatory injunction to compel such service.

In *Robinson* v. *Baltimore & Ohio Railroad Co.*,[13] the defendant railroad had charged 50 cents more per ton for the shipment of coal loaded from a wagon than from a tipple. A shipper sued in the state court to recover as damages the excess paid for coal loaded from a wagon, alleging that the rate was unjustly discriminatory. But as the rate was part of a filed and published schedule and the Commission had not acted in the premises, it was held that the doctrine of the *Abilene* case applied and the action did not lie.

The *Robinson* case goes somewhat farther than its predecessors. It was urged that a prior decision by the Commission in a proceeding brought by another shipper, finding the rate in question to be unjustly discriminatory, should have been judicially noticed by the trial court under § 14[14] of the Act. The Supreme Court overruled this contention, holding that the Commission's decision should have been introduced in evidence if relied on; but added that:

"The result * * * would have been the same had the decision been properly before the court. An examination of it discloses that it did not contain any finding or direction as to what, if any, reparation should be made because of prior exactions of the rate which it condemned. It did find that the complaining party in that proceeding had been injured by the refusal of the railroad company to furnish cars on certain occasions for the shipment of coal, and did direct that reparation therefor be made, but that is without bearing here."

This might be taken to mean that a reparation order in favor of some other shipper would have sufficed. But since a shipper who seeks to recover for unlawful discrimination must prove the extent of his actual damage, and cannot claim as of right the difference between the charges paid by him and the lowest rates charged to others,[15] a finding that some one else had suffered injury to a certain amount would have little if any bearing upon the measure of his damages. It may therefore be safely inferred from the passage quoted that the shipper should have obtained an order from the Commission awarding a specific amount of reparation *to him*

[13](1912) 222 U. S. 506.

[14]Providing that, "The Commission may provide for the publication of its reports and decisions * * * and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof" (34 Stat. 589).

[15]Penn. R. R. Co. *v.* Internat. Coal Co. (1913) 230 U. S. 184.

before bringing his action at law.[16] In other words, the Act does not contemplate a mixed proceeding, partly judicial under § 9 and in part administrative under § 16: if the shipper has to go before the Commission in the first instance, the Commission must carry the case through and award reparation if any is to be recovered, and cannot turn that function over to the court. And this would presumably be true whatever the character of the damages claimed.[16a]

Unless one believes that the court when confronted by the dilemma of doing violence to the language of a single section or of subverting the manifest purpose of the entire Act, must needs choose the latter alternative, the logic of the *Abilene* and *Robinson* decisions is unanswerable. If a carrier may be mulcted in damages for not departing from an established schedule in a given instance, it may surely compromise a claim for such damages in advance of action. Whatever the measure of these damages, the

[16]National Pole Co. *v.* Chicago & N. W. Ry. Co. (D. C. Wis. 1912) 200 Fed. 185; Franklin *v.* Phila. & R. Ry. Co. (D. C. Pa. 1913) 203 Fed. 134, *accord* as to damages for unreasonable charges. In Lehigh Valley R. Co. *v.* Clark (C. C. A. 3rd C. 1913) 207 Fed. 717, the court held that as the findings and order of the Commission in a reparation case are *prima facie* evidence only "of the facts therein stated," a finding that a former rate was unreasonable to the extent it exceeded the new rate, and an order for reparation to the amount of such excess payments, was not sufficient to make a *prima facie* case for the shipper. This was on the theory that under § 16 a shipper must prove actual damage, which would not amount as a matter of law to the difference between the rate paid and a reasonable rate. This is true as to damages for rebates or discriminations. Penn. R. R. Co. *v.* Internat. Coal Co., *supra*, note 15. It seems less applicable to actions for unreasonable rates, where the shipper may well be regarded as damaged at the moment of payment to the extent of the unreasonable exaction. Such has been the measure of damages commonly applied by the Commission. Drinker, The Interstate Commerce Act, § 314, and cases cited; see Fidelity Lumber Co. *v.* Great Northern Ry. Co. (C. C. A. 9th C. 1912) 193 Fed. 924.

[16a]In Joynes *v.* Penn. R. R. Co. (1909) 17 I. C. C. 361, the Commission held that it had no power to award damages for preferences in the use of terminal facilities, but that its jurisdiction was limited to so-called "rate damages" as distinguished from "general damages" of the kind claimed, which, it was said, could only be recovered in the courts. In Hillsdale Coal & Coke Co. *v.* Penn. R. R. Co. (1912) 23 I. C. C. 186, however, this ruling was reversed in view of the decision in Morrisdale Coal Co. *v.* Penn. R. R. Co. (C. C. Pa. 1910) 176 Fed. 748, (C. C. A. 3rd C. 1910) 183 Fed. 929, that a suit for damages for discriminatory coal car distribution could not be brought originally in the Circuit Court; and reparation for such distribution was awarded, the Commission nevertheless expressing grave doubts of its authority in the premises. This exercise of jurisdiction was sustained in Jacoby *v.* Penn. R. R. Co. (D. C. Pa. 1912) 200 Fed. 989, the court holding that the Act made no distinction between "rate" and "general" damages but gave the Commission original jurisdiction as to both in discrimination cases. Since the affirmance of the Morrisdale decision by the Supreme Court, (1913) 230 U. S. 304 (discussed *infra*), this result seems hardly open to question.

consequence of permitting their payment would be to allow the carrier to prefer the aggrieved shipper to all other similarly circumstanced, and thus to create a discrimination and give a rebate—the very practices which the Act was particularly designed to abolish.

The rule of the *Pitcairn* case follows of necessity from that of the other two. Carriers must file schedules of regulations and practices as well as of rates, and a departure from the practice thus established is made an offence equally with rebating.[17] There is no more reason in one case than in the other for permitting such a departure under the sanction of judicial process.

Underlying these particular reasons, however, is the court's conviction that the Interstate Commerce Commission is, in law and in fact, the proper body to pass on *administrative questions* arising under the Act—*i. e.*, questions as to which the Act prescribes no definite rule of action, but merely provides the tests of "reasonableness," "preference," or "discrimination" under "substantially similar circumstances and conditions."[18] These are questions of fact; and undoubtedly it was in part because of the assumed unfitness of a court or jury to pass on questions of this nature that the Commission was created. That body acts in such matters as a jury, and more; its findings cannot be upset by the courts if they have any substantial evidence to support them,[19] and it deals alike with individual complaints and general rates and practices, and both awards reparation for past misconduct and prescribes a rule for the future. In view of the nature and powers of the Commission, the court naturally imputed to Congress the purpose of confiding to it exclusive original jurisdiction of such problems.

The powers of the Commission over past as well as present and continuing rates and practices, asserted by Mr. Justice White in the *Abilene* case,[20] is attested by two recent decisions.

In *Mitchell Coal and Coke Co.* v. *Pennsylvania Railroad Co.*,[21] decided last June, the shipper claimed damages for the payment of alleged rebates to other coal companies in the same field. The published tariff named the rate from station to destination, but it was usually construed to include the haul from the mines within the

[17] See § 6 as amended by Act of June 29, 1906 (34 Stat. 586).

[18] See §§ 1, 2 and 3 of original Act (24 Stat. 379, 380) with amendments of June 29, 1906 (34 Stat. 584), and June 18, 1910 (36 Stat. 544).

[19] I. C. C. *v.* Union Pac. R. R. Co. (1912) 222 U. S. 541, 548, 550; I. C. C. *v.* Louisville & Nashville R. R. Co. (1913) 227 U. S. 88.

[20] (1907) 204 U S. 426, 442.

[21] (1913) 230 U. S. 247.

district and was so applied on all shipments made by the plaintiff as well as its competitors. The carrier had paid to many of these companies a so-called trackage or lateral allowance as compensation for hauling cars from their mines to the station. Upon its refusal to make such allowance to the plaintiff, this action was brought in the district court. The carrier sought to justify the allowance, contending that because of dissimilar conditions it could itself haul plaintiff's cars from the mines but could not do so economically for the other shippers.

The court, regarding as proper the construction of the rate as from mine to destination, held (Mr. Justice Pitney dissenting) that whether or not the allowance was proper was an administrative question for the Commission to pass on, and hence that the action did not lie. It was said that since "the legal quality of the practice complained of" was not "definitely fixed by the statute," the legality of the allowance depended upon its reasonableness:

"But to determine that question involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of the rate-regulating tribunal. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit * * * ."[22]

The further feature of the case, that the claim was "based upon the unreasonableness of past rates and discontinued practices," gave rise to the assertion that nothing was presented but a judicial question for the courts to decide. This contention was decisively overruled, the court pointing out that the "rate-regulating discretion" was equally involved in dealing with past and with present rates, and that the courts had no more authority to declare unreasonable a former rate lawfully established than a present one.

In *Morrisdale Coal Co.* v. *Pennsylvania Railroad Co.*,[23] the matter complained of as undue discrimination was a long abandoned method of coal car distribution which operated to the alleged injury of the complaining shipper. Here too the court held (Mr. Justice Pitney again dissenting) that a prior finding by the Commission that the practice was unreasonable was essential to the cause of action.

The power to investigate, and award reparation for, past misconduct is thus seen to be plenary, and not merely incidental to the power to deal with existing abuses; and so defined, it is exclusive.

[22] *Ibid.* p. 255.

[23] (1913) 230 U. S. 304.

The court has thus definitely rejected the distinction urged by Mr. Justice Pitney in his dissenting opinion,[24] that questions of administration necessarily relate solely to the present and future, and not to the past. The determining factor is the nature of the problem presented, and not its place in point of time.[25]

The above cases all rest on the circumstance that questions of an administrative nature were involved. Where no administrative question is presented, the situation is governed by the rule laid down in *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*,[26] decided on the same day as the two cases last cited. There the carrier had collected the published tariff rate on all coal but differentiated between "free coal" and "contract coal" (*i. e.*, coal already sold for future delivery), refunding on the latter a certain sum to the shippers. The published tariffs made no distinction between contract and free coal, but named one rate for both. It was consequently held that a shipper who had not received such rebates and had been damaged by their payment to others, could recover his damages in an action at law without prior action by the Commission in the premises.

Here the preference complained of was a departure from a filed and published rate; and that was unlawful as a matter of law. Consequently it was immaterial whether a difference in rates *could* have been made between free and contract coal, since "none was made in the only way in which it could have been lawfully done." There was, therefore, "no call for the exercise of the rate-regulating discretion of the administrative body" to determine that purely academic question.

Cases are likely to arise where the question whether the illegality of the carrier's conduct is matter of law or of fact will prove a

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[24] *Ibid.* p. 267.

[25] In this respect the administrative function of the Commission is broader than the legislative, as distinguished from the judicial, function of such a body, which "looks to the future" exclusively. Prentis *v.* Atlantic Coast Line R. R. Co. (1908) 211 U. S. 210, 226. Indeed, the Commission's administrative duties may be said to partake of the legislative, executive, and judicial functions. I. C. C. *v.* Goodrich Transit Co. (1912) 224 U. S. 194, 214; Proctor & Gamble Co. *v.* United States (1912) 225 U. S. 282, 296. The constitutionality of delegating such power to one body can no longer be questioned in view of the Supreme Court's liberal attitude toward the theoretical separation of powers required by the Constitution, Art. III, § 1. Union Bridge Co. *v.* United States (1907) 204 U. S. 364; Oceanic Steam Nav. Co. *v.* Stranahan (1909) 214 U. S. 320; United States *v.* Grimaud (1911) 220 U. S. 506; I. C. C. *v.* Goodrich Transit Co., *supra*. For a discussion of the general question, see Pound, "Justice According to Law," 14 Columbia Law Rev. 12-26.

[26] (1913) 230 U. S. 184.

close one. It is believed, however, that the test adopted in the *International Coal Mining Co.* case will solve nearly all such difficulties. For example: carriers frequently give a month's credit or even more to regular shippers. If the rules governing the extension of credit are set forth in the published tariffs, the question of the legality of the practice—*i. e.*, whether it was an undue preference to the shippers thus favored—might well be held to depend upon its reasonableness, and thus to be in the primary cognizance of the Commission. But the giving of credit not so named in the tariffs would seem to be a departure from the filed and published schedule, and therefore unlawful *per se* as a secret rebate.[27] Since the carrier has failed to provide for credit in the only lawful way, the reasonableness of the practice is not in issue. For the printed schedule is designed to cover *all* the relations between shipper and carrier under the Act, and anything outside its four corners is *anathema* and void.[28]

Again: the propriety of lateral allowances is intrinsically an administrative question.[29] But an allowance to a consignee for hauling his freight in wagons from station to warehouse, if not granted in accordance with the printed schedule, involves a departure from the published rate which no ruling by the Commission could validate, and is therefore "a gift—a rebate—a thing *ipso facto* illegal and prohibited by the statute."[30]

These instances suggest, however, a possible qualification of this test. Some practices have been judicially condemned as unjustly discriminatory *per se,* whether contained in the printed schedule or not. Thus, a carrier may not charge railroads less than it charges other shippers for transporting coal,[30a] nor sell transportation for

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[27]See United States *v.* Hocking Valley Ry. Co. (D. C. Oh. 1911) 194 Fed. 234; United States *v.* Sunday Creek Co. (D. C. Oh. 1911) 194 Fed. 252.

[28]Chicago & Alton R. R. Co. *v.* Kirby (1912) 225 U. S. 155, holding that a contract to expedite a particular shipment, although for an extra compensation, was void as a preference because not provided for in the tariffs.

[29]Mitchell Coal Co. *v.* Penn. R. R. Co., *supra.*

[30]*Ibid,* 260-261; see Wight *v.* United States (1897) 167 U. S. 512.

[30a]I. C. C. *v.* Balt. & Ohio R. R. Co. (1912) 225 U. S. 326. Here the order of the Commission, it was said, "was not merely administrative, but proceeded from a construction of §§2 and 3," and hence was one which the Commerce Court had power to review. 225 U. S. 326, 340. The opinion in I. C. C. *v.* Del., L. & W. R. R. Co. (1911) 220 U. S. 235, 254-256, on the other hand, indicates that the legality of a discrimination in rates against forwarding agents may depend upon circumstances within the exclusive cognizance of the Commission even though the Act does not authorize such discrimination,—an anomalous result if true.

advertising.[30b] Decisions of this sort apparently proceed upon the theory that the conduct complained of is illegal as matter of law, regardless of surrounding circumstances. Where this is so, since no ruling by the Commission could legalize the violation of the statute, there seems to be nothing for the administrative discretion of that body to act upon. In that situation it would seem useless to require the shipper to obtain an order by the Commission before bringing his action at law for damages or mandamus. In every action brought without such a ruling, the court must first decide whether the complaint alleges facts amounting in law to a clear infringement of the Act in order to determine its own jurisdiction; and if our reasoning is sound, this question cannot always depend solely on whether a departure from the schedule is involved. That is too narrow a test to meet all cases. A carrier should not be allowed to convert a plain violation of law into an administrative problem simply by filing a schedule setting forth the illegal practice in terms.

Hence the unqualified statement that questions of discrimination or preference are always administrative in character is perhaps too broad. The test may rather be, whether or not the case presents any question upon which the finding of the Commission would be conclusive as a finding of fact. If it does, it involves matters of administration with which the Commission alone can deal; but if not, a court should be competent to handle the problem *de novo,* like any other judicial question. This possible limitation on the *Abilene* principle, while largely a matter of conjecture until reduced to certainty by the Supreme Court,[30c] cannot be wholly ignored in determining the true scope of that doctrine.

[30b]Chicago, Ind. & L. Ry. Co. *v.* United States (1911) 219 U. S. 486, 496. Although in this case the alternative mode of payment by advertising apparently was not set out in the tariffs, the court seemed to consider such payment unlawful as in violation of § 2 regardless of that fact. The Commission here had requested that the suit be brought, but had made no order.

[30c]Our suggestion is supported, however, by a comparison of the Pitcairn case (1910) 215 U. S. 481, and I. C. C. *v.* Ill. Cent. R. R. Co. (1910) 215 U. S. 452, where substantially the same tests were applied in determining whether a court could act without a prior finding by the Commission and whether an order by that body could be set aside by the court. See Morrisdale Coal Co. *v.* Penn. R. R. Co. (1913) 230 U. S. 304, 313. See also Chicago & A. Ry. Co. *v.* United States (C. C. A. 7th C. 1907) 156 Fed. 558, 560, where it is said that publication of a schedule "could not save what is a rebate from being found to be a rebate" by the court; American Sugar Ref. Co. *v.* Del., L. & W. R. R. Co. (C. C. A. 3rd C. 1913) 207 Fed. 733, 742, where it is stated that unjust discriminations or undue preferences may be punished "as direct violations of law, without reference to the administrative functions of the Commerce Commission;" and La. & P. Ry. Co. *v.* United States (1913) 209 Fed. 244, 250, where the question is expressly left open by the Commerce Court.

The attempt has also been made in the federal courts to enjoin the filing, publication or enforcement of a new interstate rate as unreasonable, without prior action by the Commission. The Circuit Courts of Appeals have divided on this question; and the Supreme Court has not yet been called upon to settle it. By the weight of authority, the court has no jurisdiction thus to anticipate a determination by the Commission, even pending action by that body.[31] Only once[32] has it been said that a court has jurisdiction to restrain in the absence of a pending or contemplated complaint before the Commission, or itself to pass on the question of reasonableness. And in the case last cited (in which such a complaint actually was in contemplation) the court refused to exercise the

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In Stony Fork Coal Co. *v.* L. & N. R. R. Co. *supra* (note 12), at p. 94, the Commerce Court based its jurisdiction originally to issue mandamus upon the proposition that the violation charged was of a legal duty "so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body" and hence within the exception to the rule laid down in the Pitcairn case, 215 U. S. 481, 499. And in L. & N. R. R. Co. *v.* Cook Brewing Co., *supra* (note 12), where notice of refusal to ship into dry territory had been filed with the Commission, it was said that the alleged discrimination depended upon "a question of general law for a judicial tribunal, and one not competent for the Commission as a purely administrative body." 223 U. S. 70, 84.

[31]Columbus I. & S. Co. *v.* Kanawha & M. Ry. Co. (C. C. A. 4th C. 1910) 178 Fed. 261; Houston Coal & Coke Co. *v.* Norfolk & W. Ry. Co. (C. C. A. 4th C. 1910) 178 Fed. 266; Atlantic Coast Line R. R. Co. *v.* Macon Grocery Co. (C. C. A. 5th C. 1909) 166 Fed. 206; Wickwire Steel Co. *v.* N. Y. C. & H. R. R. Co. (C. C. A. 2nd C. 1910) 181 Fed. 316. *Contra,* Northern Pac. Ry. Co. *v.* Pac. Coast Lumber Mfrs. Assn. (C. C. A. 9th C. 1908) 165 Fed. 1; Union Pac. R. R. Co. *v.* Ore. & Wash. Lumber Mfrs. Assn. (C. C. A. 9th C. 1908) 165 Fed. 13; M. C. Kiser Co. *v.* Central of Ga. Ry. Co. (C. C. Ga. 1907) 158 Fed. 193.

In the Atlantic Coast Line case, *supra,* the decree of the Circuit Court of Appeals dismissing the bill for want of jurisdiction under the Interstate Commerce Act was affirmed by the Supreme Court on other grounds, and "without expressing an opinion as to the merits of the reasoning" upon which the judgment below was based. Mr. Justice Harlan, dissenting, declared that the case could have been disposed of, and the same result reached, on the authority of the Pitcairn case. Macon Grocery Co. *v.* Atlantic Coast Line R. R. Co. (1910) 215 U. S. 501, 510, 511.

It has been held, indeed, that a court may stay such a suit pending an application to the Commission to determine the reasonableness of the proposed rate, and upon a determination thereof in the shipper's favor may enjoin the rate. Southern Railway Co. *v.* Tift (1907) 206 U. S. 428. In the case cited, however, the court recognized the difficulty of reconciling the view that an injunction may issue *before* the Commission has acted with the principle of the Abilene case. 206 U. S. 428, 437. And since the amendment of 1910 to §15 (36 Stat. 551) giving the Commission power to suspend new rates pending a hearing, it may be doubted whether the doctrine of the Tift case would be followed.

[32]Jewett Bros. *v.* Chicago M. & St. P. Ry. Co. (C. C. S. Dak. 1907) 156 Fed. 160.

jurisdiction which it claimed, on the ground that the Commission would then have nothing left to decide. This *reductio ad absurdum* demonstrates the soundness of the prevailing view,—that the Act contemplated the filing of a rate and its enforcement without judicial interference, and left to the Commission the task of determining its reasonableness. Indeed, if the Interstate Commerce Commission has sole primary jurisdiction of an action for damages resulting from a rate already in force, *a fortiori* it has of a complaint concerning a future rate, where even according to Justice Pitney's distinction heretofore mentioned the question presented is wholly an administrative one. Especially is this so now that the Commission, under § 15, may suspend a new rate pending an investigation of its reasonableness.

The result of the civil cases may be thus summarized:

(1) An action for damages for unreasonable or discriminatory practices or rates, or a petition for mandamus to compel the abandonment of a discriminatory or preferential rate or practice, does not lie unless founded on an order by the Commission determining the question of fact in the shipper's favor, and awarding the particular reparation or decreeing the particular relief demanded.

(2) Such an order may not be necessary, however, if the discrimination charged is illegal *per se* and as matter of law.

(3) Suit may be brought without prior action by the Commission to recover damages for, or (probably) to compel the relinquishment of, a rate or practice not according to the filed and published schedule.

(4) By the better view, a suit to restrain the enforcement of a proposed advance or change in rates as unreasonable is not maintainable either before or pending action by the Commission.

CRIMINAL PROSECUTIONS.

Until the past year, no serious attempt had been made to extend the *Abilene* rule to criminal cases. To be sure, prosecutions for violations of the Act had been numerous. Almost without exception, however, these had been for rebating, overcharges, and other departures from the filed and established rate.[33] Such

[33]Giving and accepting rebates: Chicago & Alton Ry. Co. *v.* United States (C. C. A. 7th C. 1907) 156 Fed. 558; affirmed without opinion (1909) 212 U. S. 563; N. Y. C. R. R. Co. *v.* United States (1909) 212 U. S. 481, 500 (2 cases); United States *v.* N. Y. C. R. R. Co. (1909) 212 U. S. 509;

cases, as we have seen, present no opportunity for the exercise of administrative discretion. Whether or not they involve violations of the Act is in each instance a question of law which, if raised in a civil suit, could be determined without invoking the powers of the Commission.

A few decisions in the district courts have gone farther than this, and sustained indictments for unjust discrimination where no finding by the Commission was alleged.[34] In only one of these,[35] however, was the authority of the *Abilene* case relied on in defence; and the grounds on which the court distinguished that case were at least questionable.

The question whether an indictment for unreasonable rates, unlawful preferences or unjust discriminations is maintainable without a prior finding by the Commission against the carrier on these issues was therefore *res nova* until quite recently. It was settled by the Supreme Court in *United States* v. *Pacific and Arctic Co.*,[36] decided in April last.

That was an indictment against the principal railway company in Alaska and three steamship companies operating between Seattle, Vancouver, and Skagway, Alaska, alleging unjust discrimination in the transportation of passengers and freight as against the Humboldt Steamship Company, a competitor of the defendant steamship lines. It was charged that the defendants had entered into an arrangement for the through billing of freight and passengers from the southern ports to points on the Yukon at a joint through rate, but that the defendant railroad had refused without cause to make such an arrangement with the Humboldt Company, and consequently charged that company from 5 to 30% more for carrying freight than it received from the defendant steamship companies under the joint through rate.

The district court sustained a demurrer to the indictment on the ground that it lacked jurisdiction to entertain the questions

United States *v.* Miller (1912) 223 U. S. 599; Great Northern Ry. Co. *v.* United States (1908) 208 U. S. 452; Armour Packing Co. *v.* United States (1908) 209 U. S. 56; Wight *v.* United States (1897) 167 U. S. 512. Overcharging: United States *v.* Texas & P. R. R. Co. (C. C. La. 1911) 185 Fed. 820.

[34]United States *v.* DeCoursey (D. C. N. D. N. Y. 1897) 82 Fed. 302; United States *v.* Vacuum Oil Co. (D. C. W. D. N. Y. 1907) 153 Fed. 598, 605; United States *v.* Hocking Valley Ry. Co. (D. C. Oh. 1911) 194 Fed. 234; United States *v.* Sunday Creek Co. (D. C. Oh. 1911) 194 Fed. 252. In each of these except the Vacuum Oil Co. case, the indictment could have been sustained as charging a rebate.

[35]United States *v.* Vacuum Oil Co., *supra.*

[36](1913) 228 U. S. 87.

involved until the alleged discrimination had been passed upon by the Commission. This ruling was upheld by the Supreme Court, which expressly held that the principle of the *Abilene* and *Pitcairn* cases was equally applicable to criminal and to civil proceedings.

It was urged by the Government in argument that the Interstate Commerce Act made no provision for the *effect* of a finding by the Commission in criminal cases; that if such finding were ineffectual, it would be vain to require it; that to make it conclusive or *prima facie* evidence was unwarranted by the Act and perhaps in violation of the Sixth Amendment. It was further pointed out that such an administrative finding must be equally effective whether against the defendant or for him; and if a finding in his favor could be set up in bar to a prosecution, the Interstate Commerce Commission would become "practically the court of final criminal jurisdiction." The court's answer to these arguments is worth quoting:

"The contentions of the Government would be formidable in deed if the Interstate Commerce Act was entirely criminal. But it is more regulatory and administrative than criminal. *It has, it is true, a criminal provision against violation of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission.* This view avoids the consequences depicted by the Government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the Interstate Commerce Act what it was intended to be and defined to be in the cases cited by the District Court, to-wit: *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* and *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co., supra.* And it would in our judgment be an erroneous view to take that the great problems which the act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the Interstate Commerce Act to establish a tribunal to determine the relation of communities, shippers and carriers and their respective rights and obligations dependent upon the act has been demonstrated by the cited cases, *and also the sufficiency of its powers to deal with the circumstances set forth in the indictment.*" (Italics ours.)[37]

This passage, particularly the italicized portion, seems to suggest at least that in cases of this class, involving questions of unreasonableness and discrimination, *there is no offence* until the Interstate Commerce Commission has made an order altering the

[37] *Ibid.* p. 107.

rate or practice complained of *and that order has been violated.* In other words, a discriminatory or unreasonable rate or practice is not a *criminal* violation of the Act unless persisted in after its cessation has been decreed by the Commission.

Nor is there any question that the court intends the same tests of jurisdiction to apply hereafter in criminal as in civil cases. In *Mitchell Coal Co.* v. *Pennsylvania Railroad Co.*,[38] an action for damages, plaintiff relied on an earlier criminal case[39] where the Supreme Court, without preliminary action by the Commission, held that a certain allowance to a consignee was a rebate and punishable under the Statute. The court, however, distinguished that case, not as a criminal prosecution, but simply because it involved a departure from the published rate which was *ipso facto* illegal. The act complained of, it was said, was therefore one "for which the guilty carrier was subject to criminal indictment, and for which damages could have been awarded on the civil side of the court."[40] In other words, if under a given state of facts a ruling by the Commission is an essential preliminary to a civil suit, it is equally indispensable to a criminal prosecution; and *vice versa.* The body of law worked out in private suits may therefore be transferred and applied without change to the criminal side of the docket.

The first objection to this result is that it seems to ignore the plain provisions declaring all such rates and practices unlawful and in violation of the Act,[41] and making all violations of the Act punishable offenses.[42] The court apparently was not blind to this seeming obstacle. But again it found itself confronted by the dilemma presented in the *Abilene, Pitcairn* and *Robinson* cases—that of adhering to the strict language of a particular provision or of interpreting that provision in the light of the Act as a whole. In view of its previous course in that situation, its choice of the latter alternative is not surprising.

It cannot be denied, however, that the decision in effect wipes out the criminal efficacy of the provisions[43] requiring reasonable-

[38] *Supra.*

[39] Wight *v.* United States (1897) 167 U. S. 512.

[40] (1913) 230 U. S. 247, 261.

[41] §§ 1, 2 and 3, note 18 *supra.*

[42] § 10 as amended (25 Stat. 857); (36 Stat. 549). See also § 1 of the Elkins Act (32 Stat. 847) as amended in 1906 (34 Stat. 587), expressly making discrimination a misdemeanor.

[43] Notes 41 and 42 *supra.*

ness and forbidding preference and discrimination. When the rate or practice complained of is brought before the Commission, that body, if it finds the complaint justified, will order a new rate or regulation filed. And when filed it is to be observed; a departure from its terms is *per se* a violation of the Act, regardless of the causes which led to its adoption.[44] True, the carrier might openly refuse to file the new rate or obey the order; and it may be argued that even under the *Pacific and Arctic* decision such refusal would necessarily be unreasonable or discriminatory.[44a] But in view of the distinct penalties now imposed for any violation of an order by the Commission,[45] the argument seems open to doubt; and as a practical matter the question is unlikely to arise, since carriers to-day find it more profitable not to incur those penalties, but to obey the Commission's orders and contest them, if at all, by equity proceedings in the courts.

It follows that while a carrier, after the Commission has found its rate or practice discriminatory or unreasonable, may be held to account civilly for damages accruing to a shipper prior to such finding, it probably cannot be punished criminally for such antecedent misconduct. While anomalous on its face, the result is not an undesirable one. If the average jury is incompetent to decide the complex questions of reasonableness and discrimination in an action for damages, it can hardly be asked to do so in a criminal prosecution. Where experts honestly differ, twelve laymen would seldom be found to agree with a like number in another jurisdiction; and the consequence would be intolerable confusion as well as frequent injustice to defendant carriers, whose views on a nice question of railroad administration happened to conflict with those of a particular jury. Indeed, it might well happen that the Commission would sometimes be actually, if not legally, *particeps criminis*. If the ruling of that body *against* the carrier were not a necessary prerequisite to an indictment, it is hard to see why its finding *for* the carrier should be a bar to prosecution. We might thus have juries condemning criminally an act which the Commission had expressly sanctioned.

It may be suggested that these consequences could have been avoided, and the full effect of the Act preserved, by holding that the carrier might be indicted, *after* an adverse finding by the Com-

[44] Section 6 as amended, note 17 *supra;* § 1 of Elkins Act, note 42 *supra.*

[44a] See La. & P. Ry. Co. *v.* United States (1913) 209 Fed. 244, 251, where the Commerce Court states that disobedience of an order of the Commission "would involve not merely the penalties prescribed by the act for illegal transactions, but the other and heavier penalties therein prescribed" for violating such an order.

[45] Section 16 as amended in 1906 (34 Stat. 590); § 6 as amended in 1910 (36 Stat. 548).

mission, for its previous misconduct. There are several objections to this. Some of them were suggested in the Government's brief, above referred to: that the Act says nothing about the effect of such a finding in a criminal trial, and consequently the court could not give effect to it without legislating; that to hold it ineffective would render its requirement a vain thing. But beyond all this, there is at least an apparent injustice in holding any person, individual or corporate, answerable criminally for conduct concerning whose legality honest men both can and do differ. The certainty requisite to a criminal statute appears to be wanting here.[46] The carrier, it is true, must act at its peril so far as its civil liability is concerned. Every new rate or practice may prove a ground for redress to some shipper; for be it observed that as long as the Act permits discriminations where conditions warrant them, so long will the shippers discriminated against complain of their injustice. This, however, imposes no undue hardship on the carrier: it is its business to guess right in these matters. The reparation awarded is merely compensatory, and is likely to be the difference between the rate the carrier charged and the rate it should have charged.[47] Besides, the allowance of any compensation is within the discretion of the Commission, and there is no review of that body's refusal to grant it.[48] To require the carrier to act at its peril of a criminal prosecution *where it must act* is quite another matter.

To persons who object on principle to government by commission, the decision in the *Pacific and Arctic* case will seem a dangerous step; for it is plainly in the direction of enlarging the powers of our most powerful administrative body. On the other hand, those who have no inflexible theories which predetermine their thought and judgment on new problems of government, but who prefer to test empirically the wisdom of new solutions, are likely to welcome it as an intelligent extension of that body's control over the railroads of the country.

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[46]This was the view expressed by Mr. Justice Brewer on circuit in Tozer *v.* United States (C. C. Mo. 1892) 52 Fed. 917, reversing 39 Fed. 904. See Waters-Pierce Oil Co. *v.* Texas (1909) 212 U. S. 86, 109, where the Tozer case is described as holding "that the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable."

[47]See note 15 *supra.*

[48]Procter & Gamble Co. *v.* United States (1911) 225 U. S. 282. The question whether this result deprives the shipper of his right to a jury trial contrary to the Seventh Amendment seems never to have been raised. The solution may be that the shipper takes the right conferred by the Act subject to the restrictions as to remedy which the Act prescribes.